

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RODNEY A. CARBAJAL, JR.,

Complainant,

vs.

DEPARTMENT OF PUBLIC SAFETY, COLORADO STATE PATROL,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on May 8, 2003, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Complainant Rodney Carbajal, Jr. ("Complainant" or "Carbajal") appeared and represented himself. Assistant Attorney General John Lizza represented Respondent Department of Public Safety, Colorado State Patrol ("Respondent" or "CSP" or "the Patrol").

MATTER APPEALED

Complainant appeals his disciplinary one-week suspension.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

1. Complainant is a Trooper with the Colorado State Patrol.

Trooper Accidents - CSP Policy

2. If a Trooper is involved in an automobile accident while on duty, CSP policy requires that Trooper to immediately notify his or her supervisor of the accident. The supervisor then serves as an investigating officer for the accident, collecting evidence, and assessing whether the

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accident involved a chargeable offense, i.e. whether the employee was at fault and violated either a Patrol procedure or a driving offense.

3. The investigating officer then fills out an accident report and sends a memo up the chain of command concerning whether the Trooper committed a chargeable offense. The District Commander makes the ultimate determination as to whether the Trooper committed a chargeable offense.

January 2002 Accident and Resulting Corrective Action

4. On January 20, 2002, Complainant was backing out of the Patrol garage. He had just finished changing the lights on his top bar and had forgotten to close the passenger side door. The door sustained damage in the amount of \$250.00. Complainant did not bring this information forward to anyone at the Patrol until a supervisor asked him about an unrelated problem with the vehicle. This accident was found to be a chargeable offense.
5. On February 14, 2002, Respondent imposed a Corrective Action for this accident, mandating that Complainant obey all traffic laws in the course of his duties and report damage to state property to a supervisor immediately.

February 2002 Accident and Resulting Disciplinary Action

6. On February 26, 2002, Complainant was at the scene of a car accident. His patrol car was sandwiched between two vehicles. While attempting to leave the scene, he backed into a parked, unattended tow truck with its emergency lights activated. Complainant's patrol car damaged the tow truck at its left rear corner, bumper and trunk lid. The patrol car was also damaged.
7. On March 20, 2002, Respondent issued a disciplinary action to Complainant for this second chargeable offense, requiring him to work two holidays without pay. It also required that he attend a remedial driving school at the Patrol.
8. Complainant attended the remedial driving school, an eight-hour class addressing what he had done wrong and what he could do better in the future.
9. Later in 2002, Complainant also attended a weeklong driving course offered by the Patrol. The class included training in high speed driving skills, backing skills, turnarounds, use of emergency vehicles, night driving, and judgment issues.

February 5 and 6, 2003 Accidents and Resulting Disciplinary Action

10. On February 5, 2003, Complainant was on duty in the evening after dark, driving west on Highway #6, a mountainous two-lane highway. He saw a potential drunk driver passing him on the other side of the highway. He immediately commenced a u-turn, and hit a delineator post with the right front corner of his patrol car. The reflector on the delineator post was not facing

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him. In addition, as he executed the u-turn, he was looking in his rearview mirror to assure no cars behind him would hit him. Therefore, he did not see the post. The damage to the post, which was made of plastic instead of metal, was \$500.00. The patrol car sustained scrape marks on the front grill and left front quarter panel.

11. The investigating officer concluded that Carbajal had driven in a reasonable and prudent manner, since he could not be expected to know where every delineator post is. However, Major Michael Anthony Padilla, District Commander, Complainant's appointing authority, after reviewing the records and the investigating officer's memo, reached a different conclusion. He found that the collision was avoidable because the post was in front of Complainant's car and was therefore visible.
12. It is found that because the delineator post was in front of Complainant's car, he could have seen it and therefore could have avoided the accident.
13. On February 6, 2003, while driving to work, Complainant heard about a three-car accident on his radio and decided to respond to the crash site immediately. A number of cars were parked on Highway 76 when he arrived, and there was no shoulder to use for passing. Complainant pulled forward through many of the parked cars. He had his lights on but did not turn on the siren. Many cars moved out of his way.
14. When he approached a white utility truck on his right, he tried to move around it. However, his patrol car mirror on the passenger side made contact with the utility truck. Instead of stopping and getting out of his vehicle to ask the driver to move his vehicle, or turning on his siren in an effort to get the driver's attention, he continued to move forward after colliding with the truck.
15. As Complainant passed the utility truck, the truck's tail pipe scratched against the passenger side patrol car door. The patrol car sustained scratches. In addition, the housing for the side mirror was broken. The utility truck's tail pipe sustained two scratches, was bent into an oval shape from a circular shape, and had to be held up with a wire after the accident.
16. Complainant parked his car and proceeded to assist with the three-car accident he had responded to. The utility truck driver parked behind Complainant's patrol car. When Complainant was finished with his work, the utility truck driver informed Complainant that he had scraped the side of his car. They walked over to the utility truck, looked it over, and saw no damage. The driver left and Complainant reported to work. Complainant did not contact a supervisor at the Patrol to report the accident he had caused with the utility truck.
17. The driver of the utility truck eventually determined that there was damage to his tail pipe and contacted the Patrol, angry about the incident. The Patrol then commenced an investigation.
18. The investigation concluded that Complainant's patrol car collided with another vehicle; that

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he saw his mirror hit another vehicle; that he failed to check for damage on his patrol car; and that he failed to notify his supervisor immediately of the accident. The memo listed Complainant's violations as the following:

- General Order #1: Members will obey the law;
- General Order #2: Members will obey lawful orders and direction, [including] verbal directives, written directives, memorandums, policies, rules, procedures, goals, mission and vision statements;
- General Order #9: Members will see to the proper care and maintenance of all property and will make no unauthorized alterations;
- Policy 303.1: Emergency Operation means the act of driving a marked or unmarked patrol vehicle with emergency lights and siren in operation while in pursuit of a violator or while enroute to an emergency call;
- Policy 505.1: Members are responsible for proper care, maintenance and operation of patrol vehicles;
- Procedure 505.3: Immediately reports to supervisor any loss of or damage to Patrol equipment;
- Title 42-4-1402: Careless Driving;
- Title 42-4-1602: Failed to give information and/or aid after damaging another vehicle; and
- Title 42-4-1606(1): Failed to notify police of an accident.

19. Complainant committed the acts and violations listed in the memo referenced in Finding of Fact Number 18.
20. When Major Padilla received the documentation of the two accidents on February 5 and 6, 2003, he issued a notice of pre-disciplinary meeting to Complainant.
21. Padilla held a pre-disciplinary meeting with Complainant, at which he presented the information concerning the reason for potential discipline, and listened to Complainant's side of the story. No evidence concerning Complainant's statements at this meeting was presented at hearing.
22. Padilla was extremely concerned about the fact Complainant had not immediately reported the accident he had caused to a supervisor at the Patrol. He felt that failure to do so had compromised the public's trust in the Patrol and reflected poorly on the Patrol as a government agency.
23. Padilla was also very concerned about Complainant's pattern of chargeable accidents, namely, four in a thirteen-month period, despite his attendance at two separate driving classes, one of which was a full week in duration.
24. On March 10, 2003, Major Padilla issued a disciplinary five-day suspension to Complainant for his conduct on February 5 and 6, 2003. The letter required Complainant to surrender his

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badges, weapon, and identification card, and that he not represent himself as a member of the Colorado State Patrol during the suspension.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the Respondent has the burden to prove by preponderant evidence that Carbajal committed the acts or omissions on which the termination was based and that just cause warranted the termination. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant did commit the acts for which he was disciplined.

As the Finding of Fact above illustrate, Carbajal committed the actions for which he was disciplined.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

Arbitrary or capricious exercise of discretion can arise in three ways, namely: (a) by neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) by failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) by exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239 (Colo. 2001).

Complainant argues that the disciplinary action imposed was too harsh, given his otherwise strong record as a CSP Trooper. He requests that the discipline be modified to working seven

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unpaid holidays.

At hearing, it was clear that Complainant is proud to serve on the Patrol and takes his job duties as a public servant very seriously. In addition, Major Padilla generally holds Carbajal in high esteem.

Major Padilla considered all relevant information carefully before reaching his decision. The discipline imposed was reasonable in view of the circumstances.

As a public agency charged with enforcing the traffic laws, the Patrol must expect its employees to meet and even exceed those laws and the moral standards they embody. Complainant demonstrated a pattern of either carelessness or inattentiveness in causing four accidents in a thirteen-month period. Of greater concern, Complainant used extremely poor judgment when he failed to immediately report the February 6 accident he caused to his supervisor. This failure to report was in direct violation of the February 2002 Corrective Action, and it reflects negatively the integrity of the Patrol. Major Padilla demonstrated appropriate leadership in addressing Carbajal's pattern of misconduct through disciplinary action.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this ____ day of June, 2003.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-2136

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11-inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of June, 2003, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Rodney A. Carbajal, Jr.
11285 Jamaica Street
Henderson, CO 80640

and in the interagency mail, to:

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Andrea C. Woods